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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDY WANG,

Defendant and Appellant.

E074448

(Super.Ct.No. RIF1605005)

APPEAL from the Superior Court of Riverside County. Eric A. Keen, Judge.

Affirmed.

Micah Reyner, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

## MEMORANDUM OPINION

On February 28, 2017, Andy Wang pleaded guilty to two counts of felony elder abuse after striking a plea deal with the People.<sup>1</sup> (Pen. Code, § 368, subd. (b)(1), unlabeled statutory citations refer to this code.) The trial court placed Wang on probation for five years with a condition he serve one year in county jail, which was consistent with the parties' agreement. The court also ordered him to pay certain fines and fees, to complete a 52-week domestic violence program, and perform 20 hours of community service.

On September 10, 2019, Wang moved the trial court to reduce his felonies to misdemeanors under section 17, subdivision (b), on the basis he complied with every term of probation so far and had not had any further contact with law enforcement. He also requested the court discharge him from probation early and dismiss his case under sections 1203.3 and 1203.4.

At the hearing on the motion, the court acknowledged Wang was “doing very well” and the section 17, subdivision (b) motion “would be well-taken, especially if he was off of probation,” but concluded that “for me, it’s too early. He still has two years remaining on his probation.” The court made clear it knew “I have the authority and . . . I can terminate probation early pursuant to 1203.3,” but said “my decision is not to do that today.” It noted its “concern in this is that the People specifically bargained for a five-

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<sup>1</sup> We resolve this case by memorandum opinion because it raises no substantial issue of fact or law. (California Standards of Judicial Administration, section 8.1.)

year probation term, which your client agreed to. Again, typically and normally, unless a statute indicates, probation is generally for three years. So there must've been a reason why the People required five years and made that a condition of the bargain.” Given the parties’ agreement, the court didn’t “want to get in the middle between the parties when the parties negotiated a disposition.” It noted Wang’s motion may be better taken sometime in the future, and told him “you can refile these motions, really, any time. And I don’t really have a suggestion for you as to when it might be appropriate.” The court denied the motion. Wang timely appealed.

We appointed counsel to represent Wang on appeal, and counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issues, and asking us to conduct an independent review of the record.

Defense counsel’s brief raised one potential issue for our consideration: whether the trial court abused its discretion by denying Wang’s motion without making clear it knew it had discretion to reduce the felonies to misdemeanors. We offered Wang an opportunity to file a personal supplemental brief, and he has not done so.

Certain crimes, known as wobblers, may be punished as either felonies or misdemeanors at the discretion of the court. (*People v. Park* (2013) 56 Cal.4th 782, 789.) Elder abuse in violation of section 368, subdivision (b)(1), is a wobbler. (See *People v. Bush* (2016) 245 Cal.App.4th 992, 1004 [noting Proposition 47 did not “amend[] section 368 to change it from a wobbler to a misdemeanor”].) “When

a . . . defendant has pleaded no contest or guilty to, a wobbler that was not charged as a misdemeanor, the procedures set forth in section 17, subdivision (b) . . . govern the court's exercise of discretion to classify the crime as a misdemeanor." (*People v. Park*, at p. 790.)

A court has broad discretion under section 17, subdivision (b), in deciding whether to reduce a wobbler offense to a misdemeanor. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) We will not disturb the court's decision on appeal unless the party attacking the decision clearly shows it was irrational or arbitrary. (*Ibid.*)

Wang's motion also requested early termination of his probation under section 1203.3. Under 1203.3, the court may "revoke, modify, or change its order of suspension of imposition or execution of sentence," or "when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation." (§ 1203.3, subd. (a).) As with section 17, we review the trial court's exercise of its discretion under sections 1203.3 and 1203.4 for abuse of discretion. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121.)

Section 1203.4, on the other hand, is not discretionary. "Section 1203.4 provides that a defendant who 'has fulfilled the conditions of probation for the entire period of probation, *or* has been discharged prior to the termination of the period of probation' (italics added) is entitled as a matter of right to have the plea or verdict changed to not guilty, to have the proceedings expunged from the record, and to have the accusations

dismissed. [Citation.] If the petitioner establishes either of the necessary factual predicates, the trial court *is required* to grant the requested relief. [Citations.]” (*People v. Hawley* (1991) 228 Cal.App.3d 247, 249-250, fn. omitted.) Because Wang was still under probation, his entitlement to relief under section 1203.4 depended on whether the court decided to terminate his probation early.

When reviewing a challenge to the trial court’s understanding or application of a legal test “[w]e must presume that the court knew and applied the correct statutory and case law.” (*Thompson v. Thames* (1997) 57 Cal.App.4th 1296, 1308; see Evid. Code, § 664.) Though this presumption is rebuttable, it ““impose[s] upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.”” (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549-550, quoting *California Advocates for Nursing Home Reform v. Bontá* (2003) 106 Cal.App.4th 498, 505.)

Under these standards, the court did not abuse its discretion when it decided not to reduce Wang’s felony elder abuse convictions to misdemeanors or terminate probation early. The court ultimately decided not to grant the motion because it felt it was too early to do so. The court was obviously encouraged by Wang’s perfect compliance, and all but invited him to bring the motion again at a later date. But it ultimately concluded the bargained for five years of probation indicated a high level of culpability, and that it needed more time before deciding to reduce his conviction and/or terminate his probation. Choosing not to grant the motion on the basis it is too soon to reduce a conviction, and because the court wants to keep a defendant on probation to observe their

continued behavior, is not an abuse of discretion. (*People v. Sy* (2014) 223 Cal.App.4th 44, 66 [finding no abuse of discretion denying a motion under section 17, subdivision (b), where “[t]he court indicated it wanted an opportunity to consider her performance on probation before granting her request,” even though the trial court had already granted her husband’s motion to reduce his conviction for the same offense].)

Nor is there any evidence the court was unaware it had discretion to offer any of the requested remedies. Though the court and the parties discussed only the court’s discretion to terminate probation early, there is no indication the court was unaware it had the discretion to reduce the felony convictions to misdemeanors or dismiss the case. In fact, it said “this motion would be—especially the 17(b) motion and the 1203.4—would be well-taken, especially if he was off of probation.” By referencing these two statutes, the court indicated it was fully aware of its discretion under section 17 and was choosing not to exercise it. Moreover, it shows the court was aware Wang would be entitled to relief under section 1203.4 once his probation ended, either by the court’s actions or by the passage of time.

We have independently reviewed the entire record for potential error as required by *People v. Kelly* (2006) 40 Cal.4th 106 and find no arguable error that would result in a disposition more favorable to Wang.

## DISPOSITION

We affirm the order denying Wang's petition.

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SLOUGH

J.

We concur:

MILLER

Acting P. J.

RAPHAEL

J.